

## Mistake of Criminal Law and its Influence on the Classification of Crime

Roman V. Veresha

The Academy of Advocacy, Kiev, UKRAINE.

### ABSTRACT

The paper examines the characteristics of a mistake of the commitment of crime as an optional feature of the mental state of the crime. The analysis conducted offers an opportunity to state that in international criminal law, a mistake of law, although taken into account, does not generally affect the classification of crime. We uncovered and substantiated the need to research mistake as one of the features of the mental state of crime. This will make it possible to reveal the real causes of crime and administer the right type and measure of punishment. Moreover, the research provides a definition of mistake of criminal law by which we should understand an incorrect view of a person of the actual substance of his/her action and the specific characteristic of social relations that are protected by criminal law and are damaged as a result of a crime. Proceeding from a scientific approach to the definition of mistake of criminal law and its role in the mental state of corpus delicti, the author proposes that mistakes of law and mistakes of fact in criminal law affect the classification of crimes.

### KEYWORDS

Classification of crime, criminal liability, mistake of criminal law, result of crime, mental state of crime

### ARTICLE HISTORY

Received 30 April 2016

Revised 17 July 2016

Accepted 09 August 2016

### Introduction

The problem of mistake of criminal law is traditionally one of the key issues in criminal-legal science (Prus, 2014; Segev, 2006). Thousands of crimes that encroach on this or that group of social relations are committed in the world every day. Some crimes have simple corpus delicti, whereas others are committed with aggravating or extenuating circumstances. Law enforcement bodies have to classify each crime. Classifying a crime means identifying all the features of corpus delicti that are specified by criminal law (Simons, 1990; Meese III & Larkin, 2012).

Correct assessment of a possible mistake is very often a decisive factor for classifying crimes and delivering judgment since when all the elements of crime and its results are present, it often transpires that the accused person did not intend to commit the crime he or she is accused of (Simons, 2011; Fatkullina, 2011). Therefore, the research and establishment which particular ends the accused person envisaged to his/her actions is possible during a detailed analysis of the crime, clarification of circumstances of the crime with a view to detecting a possible mistake.

**CORRESPONDENCE** Roman V. Veresha  rveresha777@mail.ru

© 2016 Veresha. Open Access terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>) apply. The license permits unrestricted use, distribution, and reproduction in any medium, on the condition that users give exact credit to the original author(s) and the source, provide a link to the Creative Commons license, and indicate if they made any changes.



However, scientific publications reveal an uncertainty and lack of single approach to interpreting the essence of mistake of criminal law and its separation from such category as negligence (Akutaev & Magomedov, 2016). International science has not resolved the issue of whether mistake of criminal law affects the classification of crimes (Abdilov et all., 2016). Owing to the lack of a single scientific approach to these issues, numerous difficulties arise in the classification of crimes (Chernenko, 2014).

The mental state of crime has been subject to debate in modern criminal law. Different scholars view it differently, which entails difficulties in establishing the boundaries of criminal liability as well as classification of crime. The issues of mistake of subject of crime and the impact of mistake on classification of crime are the most widely debated (Davydovych, 2013; Simons, 2009).

### Literature review

The juridical literature dedicated to the analysis of mistake of law maintains that mistake is a result of fallacious activity/inactivity detected during the actions of subjects of law enforcement, with regard to making a wrong or erroneous decision (Prus, 2014; Davydovych, 2013).

Some researchers believe that mistake of criminal law is a situation in which the subject has such convictions that do not agree with facts or legal regulation of affairs (Robinson & Grall, 1983). Mistakes are especially relevant in criminal law when they demonstrate a state of conviction that disagrees with the law (Simons, 2009).

In general, mistake of criminal law implies a misapprehension of the subject of crime as regards the legal properties or empirical evidence of an act committed by him/her.

Let us consider the ideas advanced by other authors as regards mistakes of law and mistakes of fact in criminal law as well as the difference between them.

Some researchers note that “mistake of fact is a misapprehension of a person as regards the factual objective qualities of corpus delicti” (Larkin, 2013). In case of mistake of fact, a person appreciates the juridical, legal, characteristic of a certain act as a specific crime but is mistaken about its factual objective qualities. Mistake of fact is possible only on condition of consciously and purposefully committed act, which is subject to criminal-legal treatment. However, this does not give grounds to conclude irrevocably that the crime was premeditated or that there was any crime at all.

Criminal legislations of some countries include provisions on mistake of law and/or mistake of fact which affect classification of crimes. Thus mistake of law and/or mistake of fact may serve as a circumstance that exempts a person from criminal liability (Bazhanov, 1992).

Norms regarding mistake of fact and mistake of law are set forth in many countries' legislations, for instance in the Criminal Codes of Austria, Italy, Spain, Germany, Norway, Poland, San Marino, France, Japan, and some states of the USA, for instance, New York State (Kirsch, 1999; Pakutin, 2003).

"According to the Criminal Code of the Republic of Poland, one is not a criminal when one commits a forbidden act while being mistaken as to its circumstance that excludes illegal behavior or guilt (Article 29); one is not a criminal if one commits a forbidden act while being genuinely mistaken about its illegality (Article 30)" (Annon., 1997).

The criminal law of the UK as regards precedents includes a provision on mistake of fact, when a person's will is not directed at the committed act. This is sufficient reason for exempting the doer from criminal liability (prosecution). However, mistake of law cannot be sufficient grounds for exonerating anyone of a crime" (Khavroniuk, 2006; Ptashenko, 2013).

Insuperable cause is defined by the Criminal Code of Spain (Article 14, Chapter 1, Title1, Book 1). According to it, an essential mistake related to the event constituting the offence shall preclude criminal accountability. The Criminal Code of Sweden also contains norms regarding "mistake of law" (Article 9, Chapter 24), which is one of the "general grounds for exempting from criminal liability" (Khavroniuk, 2006).

"The Criminal Code of Germany sets forth provisions for 'mistake of law' (Section 17). It is the case when the offender lacks the awareness that he/she is acting unlawfully and shall be deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the sentence may be mitigated" (Khavroniuk, 2006).

The Criminal law of the USA was formed under the influence of the system of English law. The Criminal Codes of various states are based on the Model Penal Code, developed by the American Law Institute in 1962 (Kuznetsova & Tiazhkova, 2002). A substantial (by size) provision (Article 2.04) in the said document deals with ignorance or mistake with regard to fact or law. This provision foresees a person's exemption from criminal liability in case of his/her ignorance or mistake as to the fact or law, if there was no guilt of such a person as essential human element of endeavor or such exemption is due to mental state which was caused by similar ignorance or mistake.

In order to resolve the issue whether a mistake of law affects classification of crime, scientists keep debating whether ignorance of the law exempts from liability. Various opinions exist on this subject. Let us mention the authors who support the view that ignorance of the law is no excuse.

One of the principles inherent to the systems of common law of the USA and the UK is that ignorance of the law does not exempt from liability (Meese III & Larkin, 2012; Ptashenko, 2013).

K. W. Simons (1990, 2011) provides the following examples of mistakes of fact: 1) Abbie buys something and sincerely believes that it is not stolen. However, the thing *is* stolen. A stranger knocks at the door of her apartment and offers her an old DVD player at a huge discount. He says that he has recently bought it at a retail store. Because she is quite a credulous person, Abbie sincerely believes this man's lies. In reality the stranger has stolen the DVD player. In this case Abbie is not guilty. Her mistake of fact justifies her, nullifying the guilt that she is supposed to know (to believe, in fact) that the



property is stolen; 2) Barney buys a thing that he considers stolen but it is not. He, like Abbie, buys a brand-new DVD player at a huge discount from a stranger who knocks at his door and offers it to him. Barney asks the stranger why the DVD is so cheap and if it was not stolen by any chance. The stranger, who is really an undercover policeman, says that he stole it because he was hungry. After hearing this, Barney makes a purchase. In reality, the DVD player was not stolen. Barney is not guilty of a crime, he is rather guilty of an attempt at buying stolen property (Simons, 1990, 2011).

As O. D. Komarov (2014) notes, "there are two criteria that make a mistake of modus operandi significant for classifying a guilty act:

Mistake of fact has criminal-legal significance only in case of premeditated crimes. Therefore, a mistake of modus operandi is significant only in case of premeditated crimes.

In criminal law, modus operandi belongs to optional features of a subject of crime. This means that criminal law does not always link criminality of an act or its qualification to its being committed in a particular way. Mistake of fact in modus operandi is relevant only in cases when a suggestion of a certain modus operandi is contained in an article of the Special part of the Criminal Code of Ukraine or proceeds directly from it" (Komarov, 2014).

At the same time, in some cases mistake of fact does not affect classification of crime. Thus, T. G. Chernenko (2014) contends that "mistake of the substance belongs to mistakes of fact". It means that the person who commits a socially dangerous act has an erroneous view of the material (qualitative and quantitative) characteristics of the object of endeavor. Mistake of object does not always affect the classification of the committed act (Chernenko, 2014). Mistake of object of endeavor does not always result in the damage to the objects (for instance, relations of property), but if the criminal mistakenly seizes hold of a wrong object, to which his/her intent was directed, classification of the committed act will not change: what we have is a completed crime.

### Aim of the study

The purpose of this study is to examine the notion of mistake of criminal law and its influence on the classification of crime.

### Research questions

The research questions were as follows:

What are the common classifications of mistake of criminal law?

How does criminal-legal description of mistake influence on the classification of crimes?

### Method

The principles laws, and categories of the dialectic method of cognition of socio-legal phenomena made up the methodological basis of researching the criminal characteristic of mistake of criminal law, in the process of which general

scientific methods of research were applied, namely the systems, historical, logical, functional and other methods.

The following methods were also applied in the course of examining mistake of criminal law: observation (when the influence of mistake of criminal law on classification of crime was examined), analysis (during the study of the criminal legislation of Ukraine and other countries, the reference sources of defining mistake of criminal law, criminal cases, literature sources on this issue); comparison (in the study of similarity and difference of mistakes of law and mistakes of fact in criminal law); case studies and analysis of statistical data on this problem.

### Data, Analysis, and Results

If we employ this method of classification, we may group mistakes into critical/non-critical ones, important/unimportant ones, grounded/groundless ones etc. However, all these are subjective criteria which are difficult to substantiate from the legal point of view. Therefore the author does not agree with these classifications and supports the opinion of most specialists who divide the mistakes in criminal law into mistakes of law and mistakes of fact.

Moreover, mistakes of law and mistakes of fact can be subdivided into the following types (see the Tables below):

No.	<i>Types of mistakes of law</i>
1.	Mistake of the type or extent of punishment
2.	Mistake with regard to illegality of an act
3.	Mistake of classification of an act

Mistakes of fact can be divided into:

No.	<i>Types of mistakes of fact</i>
1.	Mistake with regard to substance
2.	Mistake with regard to object
3.	Mistake of means of committing a crime
4.	Mistake of qualitative characteristics of crime consequences
5.	Mistake of quantitative characteristics of crime consequences
6.	Mistake of development of causal connection

Let us focus on the influence of mistake of criminal law on the classification of crime.

According to a general rule, mistakes of law in Ukrainian criminal law have no criminal-legal value. At the same time, mistakes of fact have criminal-legal value and affect the classification of a criminal's actions and decide the question of his/her criminal prosecution (Davydovych, 2013; Bazhanov, 1992).

However, in our opinion, mistakes of law also influence the classification of crimes. Take, for instance, tax legislation. No person can get a handle on it easily unless he/she has specialist training in law. At the same time, according to Article 212 of the Criminal Code of Ukraine (Annon., 2010), tax evasion produces criminal liability. Moreover, Articles 52-53 of the Tax Code of Ukraine stipulate that "relevant bodies provide tax-payers with free consultations on the



practical application of specific norms of tax legislation. Tax consultations are individual and can be used exclusively by the tax-payer who was given a consultation. The tax-payer who acted on the advice of the tax consultant, which was put on paper, cannot be prosecuted" (Annon., 2001).

Therefore, in case of commitment of a crime according to Article 212 of the Criminal Code, but which was accompanied by actions in accordance with the tax consultation, a person may be exempted from criminal liability. It can be argued that this person committed a mistake of law with regard to illegality of an act without believing that he/she is committing a crime when acting on the advice of the relevant authority. Therefore, we may conclude that a mistake of law influences the classification of crime.

Let us take another example. While a person stays in a coma for an extended period of time, criminal legislation changes, and an act that was not a crime before the coma becomes a crime. Coming out of the coma a person commits the act, which he/she does not consider a crime. What is to be done in this situation? Is it appropriate to say that the ignorance of the law is no excuse? Let us remember that the person could not know the new law.

It can be argued that in this case the person can be exempted from criminal liability. Mistake of law with regard to illegality of an act, which affects the classification of crime, is evident here.

Mistake of law with regard to the type or extent of punishment does not affect the classification of crime, since, from the viewpoint of protecting social relations, it does not matter if the criminal knew about the extent or the type of penalty for his/her actions or was mistaken about them when carrying out his/her criminal intent.

It is more difficult to classify an act when mistake of fact (a person's erroneous view of the factual circumstances of a crime) occurs. This is explained by a higher number of types of mistakes of fact compared to mistakes of law. Classification is also made difficult by the fact that mistake of fact turns a completed crime into an attempted crime, or guilt is established in acknowledgment of the sum-total of crimes.

The mistake with regard to object (someone planned to kill a judge but mistakenly killed a stranger) creates liability for a crime that the criminal wanted to commit from the start and that was covered by his/her intent. If the planned crime was not completed, liability should occur for attempted crime. The object of criminal intent suffered no negative action as opposed to the other object, who was killed.

The mistake with regard to object consists in the misapprehension of the social relations that the act encroaches on. A person directs his/her action to inflicting damage on specific social relations but damage is mistakenly inflicted on other relations.

A mistake of fact with regard to substance sometimes affects the classification and sometimes it does not. For instance, when a criminal wanted to steal a washing machine and stole a refrigerator, the crime will be classified as theft in both cases. In case when the criminal wanted to steal a work of art

from the museum, but stole a counterfeit work, the classification will be different. The crime will be classified as an attempt at stealing works of art.

Mistake of fact in the development of causal connection may either affect or not affect the classification of crime. One of the mistakes that do not affect classification is when a criminal, having conceived a murder, aims at the chest but shoots in the stomach which causes death. The desired socially dangerous outcome, namely a murder, occurs.

Thus, on the whole we may assert that mistake of fact affects the classification of crime. The specific impact of this or that type of mistake of fact depends on the end result of a crime.

Therefore, mistake of criminal law has a significant impact on the classification of crime. When a crime is classified, it is necessary to take into account that mistakes of law and mistakes of fact play an important role in the establishment of intent which conditions the form of guilt and penalty for a crime/attempted crime as well as acknowledgment of aggravating or extenuating circumstances.

### Discussion and Conclusion

Some specialists in criminal law adhere to the position that a mistake of law does not affect the classification of crimes. In order to avoid mistake of law, it is necessary to know the law. An ignorant citizen must sometimes turn for help to appropriate authorities for a consultation. This must be done when it is not altogether clear if a certain act is a legal one. If this is not done, a citizen is guilty in case he/she commits such an act, i.e. mistake of law. Whether a citizen has legal knowledge or not does not exempt him/her of the need to understand the law properly. It is essential that an ordinary citizen should fulfill the requirements of the law whether he/she knows them or not. For instance, a foreign driver cannot claim that he/she does not know the speed limits in France (Kirsch, 1999).

Other scientists hold the opposite view. In some countries, for example, Switzerland, mistake of law is a circumstance that mitigates a punishment. If ignorance of the law or mistake of good faith is proven, the person may not be sentenced at all, or be given a conditional sentence, as in Austria (Khavroniuk, 2006).

To sum up, the investigation of mistake in criminal law is accounted for by the need of correct classification of a crime as well as establishing the type of guilt of the criminal and imposing a penalty in accordance with his/her guilt or, probably exempting him/her from criminal liability.

A correct analysis of an alleged mistake is often decisive in classification of crimes and delivery of judgments, since often when all the elements essential to the offence and its result are present, the accused person had not intended to commit the crime he /she is accused of. Therefore, the examination and the establishment of specific criminal consequences that the accused person wished and envisaged with regard to his/her actions are possible in the course of a



detailed analysis of a crime, the establishment of all its circumstances as regards a possible mistake.

Mistake of criminal law is an incorrect (erroneous) view of a person as to the actual substance of his/her act and specific characteristics of the social relations protected by the criminal law which are damaged as a result of the crime.

Moreover, mistake of criminal law is divided into two kinds: mistake of law and mistake of fact. A mistake of law is mistake on the type or extent of punishment, the illegality of an act and classification of the crime. Mistake of fact is a misapprehension of the person about the factual circumstances of a crime.

The fact of mistake of criminal law has a considerable influence on the classification of crime. Mistake of law and mistake of fact play a significant role in establishing the intent of an act, which, in turn, predetermines the form of guilt, penalty for the crime or attempted crime, the fact of aggravating or extenuating circumstances.

Mistake of law with regard to illegality of an act or the classification of crime affects the classification of crime, whereas mistake of law as to the type or extent of penalty does not affect the classification of crime. Specific influence of this or that type of mistake of fact depends on the end result of a crime.

### Implications and Recommendations

The article's practical relevance lies in the opportunity of using the obtained results in elaborating criminal legislation. It can be amended by provisions that mistake of law and mistake of fact are two types of mistake of criminal law, when the issues of criminal liability and punishment for crimes involving a mistake are differentiated.

The results of the study may also be used for classification of crimes in law-enforcement practice. This investigation contributes to science by positing that mistake of law and mistake of fact as types of mistakes in criminal law affect the classification of crimes, which makes it possible to understand the real causes of crimes and administer the right type and measure of punishment.

### Disclosure statement

No potential conflict of interest was reported by the authors.

### Notes on contributors

**Roman V. Veresha** is a PhD, Professor of the Criminal and Administrative Law Department, The Academy of Advocacy, Kiev, Ukraine.

### References

- Abdilov, K. S., Zusbaev, B. T., Naurybsaev, E. A., Nukiev, B. A., Nurkina, Z. B., Myrzahanov, E. N. & Urazalinc, G. T. (2016). Basis of Criminalistic Classification of a Person in Republic Kazakhstan and Republic Mongolia. *International Journal of Environmental and Science Education*, 11(11), 4751-4759.
- Akutaev, R. & Magomedov, G. (2016). On the Crime Object. *International Journal of Environmental and Science Education*, 11(11), 4218-4228.

- Annon. (1997). *The Criminal Code of the Republic of Poland*, dated 06.06.1997. Direct assess: [http://www.legislationonline.org/download/action/download/id/4286/file/POLAND\\_CC\\_am2012\\_%20PL.pdf](http://www.legislationonline.org/download/action/download/id/4286/file/POLAND_CC_am2012_%20PL.pdf).
- Annon. (2001). The Criminal Code of Ukraine adopted on April 5, 2001 No 2341-III. Newsletter of the Verkhovna Rada of Ukraine. No. 25-26. Article 131.
- Annon. (2010). The Tax Code of Ukraine adopted on December 2, 2010. No. 2755 –VI. Official newsletter of Ukraine, 2010. No 92. – pp. 3248.
- Bazhanov, M. I. (1992). Criminal law of Ukraine. General part: lecture notes. Dnepropetrovsk: Bridges.
- Chernenko, T. G. (2014). Mistake of fact with regard to the object and subject of an endeavor. *Journal of Altai Academy of Economics and Law*, 3(35), 126-130.
- Davydovych, I. I. (2013). Mistake with regard to the victim and its criminal significance (criminal endeavors on representatives of public authorities in connection with the performance of their official or civic duties). *Scientific gazette of the National University of Life and Environmental Sciences of Ukraine*, 182(1), 306-315.
- Fatkullina, M. B. (2011). *Mistakes of law and mistakes of fact in criminal law: problems of classification*. PhD thesis. Yekaterinburg, Russia, 178 p.
- Khavroniuk, M. I. (2006). *History of criminal law of European countries*. Kyiv: Istyna.
- Kirsch, A. (1999). France Mistake of law in French criminal law. *Amicus Curiae*, 16, 25-28.
- Komarov, O. D. (2014). Mistake of fact with regard to modus operandi. *4th Kharkiv conference in criminal law: abstracts of the participants in the scientific conference of undergraduate and postgraduate students* (pp. 76-79). Kharkiv.
- Kuznetsova, N. F., & Tiazhkova, I. M. (Eds.) (2002). *A course in criminal law* (Vol. 1. General part. Theories of crime). Moscow: Zertsalo-M publisher.
- Larkin, Jr P. J. (2013). A Mistake of Law Defense as a Remedy for Overcriminalization. *ABAJ Criminal Justice*, 26(1), 10-18.
- Meese III, E., & Larkin, Jr P. J. (2012). Reconsidering the Mistake of Law Defense. *J. Crim. l. & Criminology*, 102, 725–784.
- Pakutin, V. D. (2003). The institute of circumstances that rule out the criminality of an act in the legislation of some countries: comparative analysis. In *Topical issues of the criminal procedure of contemporary Russia: inter-university collection of scholarly works* (pp. 77-84). Ufa. RIO BashSU.
- Prus, E. U. (2014). Mistake of law. Concept and characteristics. *Contemporary problems of politics*, 51, 79-86.
- Ptashenko, D. S. (2013). Imaginary defense in criminal law of other countries: specifics of regulation by criminal law and general norms with regard to law. *European prospects*, 8, 81-86.
- Robinson, Paul H., & Grall, Jane A. (1983). *Element Analysis in Defining Criminal Liability*: The Model Penal Code and Beyond, 35 STAN. L. REV., 681, 726-732.
- Segev, R. (2006). Justification, rationality and mistake: Mistake of law is no excuse? It might be a justification! *Law and Philosophy*, 25(1), 31-79.
- Simons, K. W. (1990). Mistake and impossibility, law and fact, and culpability: A speculative essay. *Journal of Criminal Law and Criminology*, 81, 447-517.
- Simons, K. W. (2009). Mistake of Fact or Mistake of Criminal Law? *Explaining and Defending the Distinction*, 3, Series CRIM. L. & PHIL.
- Simons, K. W. (2011). Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact. *Ohio St. J. Crim. L.*, 9, 487-543.